Supreme Court, U.S.
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No. 80-1968

In the Supreme Court of the United States

OCTOBER TERM, 1980

DAVID RUSSELL HUDSON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 25 U.S.C. 372, which provides that the Secretary of the Interior's determination of heirs to the estate of an intestate Indian allottee "shall be final and conclusive," precludes judicial review of petitioner's claim that the Secretary violated the Administrative Procedure Act by allowing the substitution of administrative law judges (ALJs) where the original ALJ died after hearing the testimony and the substitute ALJ issued his decision on the basis of the transcript of the hearing before the first ALJ and the exhibits received at that hearing.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-2) is not reported. The order of the district court dismissing the action for lack of jurisdiction (Pet. App. 3-4) is not reported. The opinion of the Interior Board of Indian Appeals (Pet. App. 5-14) is reported at 5 I.B.I.A. 174. The decision of the administrative law judge (App., *infra*, 1a-4a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1981. The petition for a writ of certiorari was filed on May 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Act of June 25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 372, provides in pertinent part:

> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.

STATEMENT

Alvin Hudson, a Quinault Indian whose estate is in controversy here, died intestate on January 13, 1949. Following his death, his estate was probated by an Interior Department Inheritance Examiner, who, pursuant to 25 U.S.C. 372, issued an Order Determining Heirship on December 30, 1949. The order provided that respondents Vernadine Stearns, Lois Saxton, Mildred Anderson, and Ivan Cleveland were Alvin Hudson's lawful heirs. Nineteen years later, on August 21, 1968, petitioner filed a petition with the Interior Department to reopen the estate, claiming that he was Alvin Hudson's illegitimate son and lawful heir. On May 29, 1969, the estate was reopened. Subsequently, in 1972 and 1973, two hearings were held before Administrative Law Judge (ALJ) Richard J. Montgomery (Pet. App. 6-7).

Petitioner's case rested on the conflicting and essentially uncorroborated testimony of his mother, Helen Paskas Jenna. She testified that while working as a domestic for the Hudson family, she was forcibly raped by Alvin Hudson. Petitioner, she testified, was born of that union. At the first

ALJ hearing, Jenna testified that one night in May 1941, Alvin Hudson came home drunk, "after his mother and sister had gone to bed," and raped her in the living room of the Hudsons' home (Tr. 22). Jenna further testified that she did not report the alleged rape to the police or divulge it to anyone, that she never told Alvin Hudson about her pregnancy, and that she continued to work in the Hudson home even after the alleged rape occurred (Tr. 18-23).

At the second hearing, Jenna altered her testimony after witnesses for the original heirs challenged her story. In response to their contention that it would have been impossible to rape someone in the Hudsons' living room while others were in the house, given the close proximity of the bedrooms to the living room, she stated that she was raped in the "morning, after Alvin Hudson's mother and sister were out of the house" (Tr. 97-98). At the second hearing, one Benjamin Reed also testified that he and his wife lived in the Hudsons' home during 1941 and that he did not know Jenna or the story regarding her alleged rape. He also testified that his wife, Mildred Reed, did the housework in the Hudsons' home during that time (Tr. 63, 66). Alvin Hudson's uncle, who was a neighbor of the Hudsons in 1941 and frequently visited their house, also testified that he did not know Jenna or anything about an alleged rape, and that Mildred Reed had done the Hudsons' housework during that time (Tr. 82).

Petitioner also introduced a birth certificate naming Alvin Hudson as his father and a court order changing petitioner's name to Hudson, which petitioner claimed established his paternity. But each of these had been procured in 1967, some 25 years

after petitioner was born, and each was likewise based on Jenna's word (Pet. App. 10).

At the conclusion of the second hearing, ALJ Montgomery took the case under advisement. However, Montgomery died before rendering his decision. The case was then transferred to ALJ Robert C. Snashall. On April 9, 1975, ALJ Snashall, on the basis of the transcript and exhibits, rendered a decision in favor of petitioner.[1] On September 2, 1976, the Secretary of the Interior, acting through the Interior Board of Indian Appeals (IBIA), reversed the decision of Judge Snashell and ordered the December 30, 1949, order reinstated. The IBIA held that Helen Jenna's "uncorroborated and somewhat conflicting * * * testimony" (Pet. App. 12) given some 30 years after the alleged rape, which she had never reported to the police or divulged to anyone, was not sufficient to sustain a finding in petitioner's favor (*id.* at 10-12).

Petitioner then brought the instant action in the United States District Court for the Western District of Washington, contending that the IBIA erred in judging the credibility of witnesses without having heard the evidence and that the initial decision was invalid because the ALJ who decided the case had not personally heard the evidence. The Secretary and the original heirs, respondents herein, moved to dismiss the action on the ground that 25 U.S.C. 372 precludes judicial review of the Secretary's decision. On March 5, 1979, the district court granted the motion to dismiss for lack of jurisdiction (Pet. App. 3-4). The

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[1] ALJ Snashall acknowledged that "it is always dangerous and normally unsatisfactory to base a question of paternity largely upon the statements and actions of the mother of the child" (App., *infra*, 2a) and that the evidence introduced by petitioner was insufficient to establish paternity under the laws of the State of Washington (*id.* at 3a, citing Wash. Rev. Code § 11.04.081 (1967)).

court of appeals affirmed in an unpublished memorandum decision (*id.* at 1-2), holding that determinations of the Secretary under 25 U.S.C. 372 are not subject to judicial review, that the enactment of the Administrative Procedure Act did not alter this rule, and that petitioner had not raised any constitutional challenge to the Secretary's determination that might give rise to district court jurisdiction notwithstanding the bar to judicial review contained in 25 U.S.C. 372.

ARGUMENT

The decision below is correct, conflicts with no decision of this Court or any court of appeals, and presents no issue warranting review by this Court.

1. Petitioner's principal contention before this Court is that the finality clause in 25 U.S.C. 372 does not bar review of his claim that the Secretary violated the Administrative Procedure Act, 5 U.S.C. 554(d),[2] by substituting administrative law judges without requiring a de novo hearing. The argument is without merit. 25 U.S.C. 372 provides that the Secretary's determination of heirs to the estate of an Indian allottee who dies intestate before receiving a fee patent "shall be final and conclusive." The finality clause has been consistently held by this Court and courts of appeals to preclude judicial review of the Secretary's heirship determinations. *First Moon* v. *White Tail*, 270 U.S. 243, 244 (1926); *Johnson* v. *Kleppe*, 596 F.2d 950, 952 (10th Cir. 1979); *Arenas* v. *United States*, 197 F.2d 418, 420-422 (9th Cir. 1952). Petitioner's suggestion that

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[2] 5 U.S.C. 554(d) provides in pertinent part:

> The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency.

this Court has modified its approach to judicial withdrawal statutes since deciding *First Moon* (Pet. 23) is unfounded.[3] As recently as 1970, this Court reaffirmed that Section 372 bars judicial review, concluding that "Congress quite plainly stated that the Secretary's action [pursuant to Section 372] was not to be subject to judicial scrutiny." *Tooahnippah* v. *Hickel*, 397 U.S. 598, 607 (1970).

The only occasion in which an exception has been recognized to the prohibition in 25 U.S.C. 372 against judicial review has been in an action challenging the constitutionality of the laws regulating the descent and distribution of Indian trust lands. See *Eskra* v. *Morton*, 380 F.Supp. 205, 211-213 (W.D. Wis. 1974), rev'd on other grounds, 524 F.2d 9 (7th Cir. 1975). In *Eskra*, the district court, relying on this Court's decision in *Johnson* v. *Robison*, 415 U.S. 361, 367 (1974),[4] held that the finality clause in

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[3] Petitioner's reliance on *Harmon* v. *Brucker*, 355 U.S. 579 (1958); *Oestereich* v. *Selective Service Board No. 11*, 393 U.S. 233 (1968); and *Breen* v. *Selective Service Local Board No. 16*, 396 U.S. 460 (1970), is misplaced. In each of these cases, the Court held that statutory provisions precluding judicial review did not bar actions to review agency decisions that were clearly beyond the agency's statutory authority. In the present case, petitioner has not challenged the Secretary's authority (which petitioner invoked) to determine the heirship of intestate Indian allottees. Rather, his arguments go to the procedures followed in making such determinations, which, for the reasons discussed above, do not give rise to an exception to the finality clause in Section 372.

[4] In *Eskra*, the district court stated (380 F. Supp. at 212-213; footnotes omitted):

> The question of jurisdiction in the present matter is closely analogous to that decided in *Johnson* [v. *Robison*]. In each case, (1) the underlying dispute concerns the constitutionality of a statute which is essential to the

Section 372 does not extend to actions challenging the constitutionality of a statute that is essential to the administrator's decision. Accordingly, the court determined that it had jurisdiction to examine the constitutionality of a Wisconsin statute that would not allow an illegitimate child to inherit from his mother's relatives.

Relying upon *Johnson* v. *Robison*, petitioner argues here that the district court had jurisdiction to consider his claim that he was denied due process when the Secretary failed to hold a de novo hearing following the death of the first ALJ. Petitioner's due process claim is unfounded. The ALJ who rendered the decision after the first ALJ died ruled in petitioner's *favor*. Thus, there can be no contention that petitioner was prejudiced by the substitution of ALJs. Indeed, because he prevailed before the second ALJ, petitioner *defended* the substitution of ALJs when the original heirs appealed the second ALJ's decision to the Interior Board of Indian Appeals. In these circumstances, petitioner should not now be heard to claim that the substitution of ALJs violated due process.

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administrative decision; (2) a construction of the review provision barring the courts from consideration of the underlying constitutional claim would raise grave doubts as to the constitutionality of that provision; (3) a clear congressional purpose to bar judicial review of the constitutional question is not evident; (4) the administrative agency disclaims authority to decide the constitutional issue. *Johnson* strongly suggests that I construe the finality clause of § 372 as not extending to actions challenging the constitutionality of laws regulating the descent and distribution of Indian trust lands. I do so construe § 372 and, accordingly, I have jurisdiction under 5 U.S.C. § 702 (§ 10(a) of the APA) to review plaintiff's challenge to the illegitimacy classification.

Contrary to petitioner's contention, moreover, the Due Process Clause of the Fifth Amendment does not require that the trier of facts personally hear the evidence in every case. *United States* v. *Raddatz*, 447 U.S. 667, 678-680 (1980); *Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129, 131 (2d Cir.), cert. denied, 389 U.S. 839 (1967); *Gamble-Skogmo, Inc.* v. *FTC*, 211 F.2d 106, 112-114 (8th Cir. 1954); *NLRB* v. *Stocker Mfg. Co.*, 185 F.2d 451, 453 (3d Cir. 1950). To the extent petitioner's argument rests on the contention that the Interior Board of Indian Appeals would have been bound by the credibility determinations of the ALJ (see Pet. 18-20), the argument is without merit. The Board may substitute its judgment for that of the ALJ, as it did in this case. 5 U.S.C. 557(b)[5]; *United States* v. *Raddatz*, *supra*, 447 U.S. at 680; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951); *Penasquitos Village, Inc.* v. *NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977); *Retail, Wholesale and Department Store Union* v. *NLRB*, 466 F.2d 380, 386-387 (D.C. Cir. 1972); 2 K. Davis, *Administrative Law Treatise* § 10.04 (1958).

2. Finally, petitioner contends that the finality clause of 25 U.S.C. 372 violates the principles of equal protection encompassed in the Due Process Clause of Fifth Amendment because, petitioner argues, there is no rational basis for precluding judi-

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[5] 5 U.S.C. 557(b) provides in pertinent part:

> On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

cial review of the Secretary's intestate heirship determinations while allowing judicial review of the Secretary's decisions to approve or disapprove an Indian's will. See Pet. 22-23; *Tooahnippah* v. *Hickel*, *supra*, 397 U.S. at 606-607. Petitioner did not raise this contention in the court of appeals, and there is no reason for this Court to depart from its customary practice of declining to review issues not raised or resolved in the courts below. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

In any event, there is no merit to the equal protection argument. First, in contrast to Section 372, 25 U.S.C. 373 contains no language conferring finality on the Secretary's decisions approving or disapproving an Indian's will. Second, the coverage of the statutes varies. As this Court noted in *Tooahnippah* (397 U.S. at 606), Section 372 applies only to Indians possessed of allotments. In contrast, Section 373, as amended by the Act of Feb. 14, 1913, ch. 55, 37 Stat. 678, applies to all Indians having individual Indian monies or other properties held in trust by the United States. Third, in *First Moon* v. *White Tail*, *supra*, this Court recognized that the finality provision is justified in light of the Secretary's special responsibilities with respect to allotments: An "abundant reason for the [finality] provision becomes apparent upon consideration of the infinite difficulties which otherwise would arise in connection with the sundry duties of the Secretary of the Interior relative to Indian allotments" (270 U.S. at 244). Finally, the issues involved in the distribution of intestate estates differ from those involved in testamentary estates. Will contests often involve issues of fraud, undue influence, and competence, which do not arise in cases involving intestate distribution. Congress therefore could con-

clude that there was a greater need for judicial review in proceedings involving wills. For any or all of these reasons, Congress reasonably could distinguish between these two situations for purposes of judicial review.

Distinctions drawn by Congress that do not implicate fundamental constitutional interests or rest upon suspect classifications do not violate the principles of equal protection embodied in the Due Process Clause of the Fifth Amendment unless they are "patently arbitrary or irrational." *United States Railroad Retirement Board* v. *Fritz*, No. 79-870 (Dec. 9, 1980), slip op. 10. In addition, distinctions drawn among Indians will be sustained so long as " 'the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.' " *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977), quoting *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). The finality clause in Section 372 plainly meets this standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1981

APPENDIX

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

P.O. Box 3785
Portland, Oregon 97208

IN THE MATTER OF THE ESTATE OF ALVIN HUDSON

DECEASED QUINAIELT [*sic*] NO. 1139
OF THE WESTERN WASHINGTON INDIAN AGENCY
OF THE STATE OF WASHINGTON

ORDER

The above entitled matter came on for hearing on June 26, 1972, at Seattle, Washington, and again on April 24, 1973, at Hoquiam, Washington, before the late Honorable Richard J. Montgomery, Administrative Law Judge (formerly Hearing Examiner), pursuant to an Order of Remand of the Regional Solicitor of May 29, 1969 (IA-P-17), for determination as to whether the original findings as to heirs should be corrected so as to hold petitioner, DAVID RUSSELL HUDSON, to be sole heir of decedent.

An examination of the Petition, transcript of the proceedings before Judge Montgomery and other documentary evidence contained in the file lead to the following findings of fact and conclusions of law. One Helen Paskas Jenna, then known as Helen Paskas, was employed under the auspices of the Welfare Department of the State of Washington on the Quinault Indian Reservation at Taholah, Wash-

ington, from approximately April, 1941, to October or November of 1941. Throughout this period of time she lived with a Mrs. Gray, who was her supervisor, and whom directed her to perform duties of a domestic nature for various and sundry Indian families on the Indian reservation. One of the families for whom she was assigned to work was the Hudson family, one of whom was a son, Alvin Hudson, decedent herein. Alvin Hudson and Helen Paskas Jenna engaged in sexual intercourse some time in the month of April, 1941, resulting in Helen Paskas Jenna becoming pregnant and giving birth to a child, petitioner herein, David Russell Paskas, in Seattle, Washington, on January 30, 1942. By petition of the said child, his name was changed in 1967 to David Russell Hudson by the Superior Court of the State of Washington for King County and a modified birth certificate was filed in accordance with said order. Helen Paskas (Jenna) never directly revealed to Alvin Hudson his parentage of said child but the record reflects Alvin Hudson knew, or must have known, the child was his since Helen Paskas did not leave the Taholah area until late enough in the year 1941 that the fact of her pregnancy was physically obvious. Upon her leaving the reservation, she removed herself to Seattle, Washington, for the birth of her child, and later submitted the child into the hands of the Catholic Children's Services under whose auspices the child was generally raised. Petitioner, David Russell Hudson, first learned of his probable parentage in 1966. Although it is always dangerous and normally unsatisfactory to base a question of paternity largely upon the statements and actions of the mother of the child, preponderance of the evidence

clearly disclosed Alvin Hudson was the father of David Russell Paskas Hudson.

Those in opposition to petitioner's position reasonably argue petitioner has failed to meet the specific statutory requirements of the state of Washington required to establish "paternity" and therefore even given the facts above, state of Washington law proscribes paternity of the decedent as being the child of Alvin Hudson. *RCW 11.04.081 (1967)*. However, although Federal law requires the applicability of state laws of descent and distribution for admeasurement purposes in Indian trust probate matters, state laws, statutory or otherwise, are only applicable in the absence of Federal statute, regulation or legal decision. Federal authority has elected to provide that "paternity" may be established factually by mere testimony or other evidence tending to show the paternity without resort to statutory requirements of evidence such as are required by the laws of the state of Washington. *Estate of Francis Sears*, IA-1397, *Estate of Crawford J. Reed*, IBIA 326, cf: *Estate of Harry Colby*, 69 I.D. 113.

It appears, therefore, the Order Determining Heirs of December 30, 1949, is in error and should be modified so as to name as sole heir at law of the decedent herein, DAVID RUSSELL HUDSON.

NOW, THEREFORE, IT IS HEREBY ORDERED the Order Determining Heirs of December 30, 1949, is modified so as to delete therefrom as heirs of the decedent, BERNADINE REED, LOIS JEAN REED, LEDA REED, and IVAN STACY REED and insert in lieu thereof as sole heir at law of the decedent DAVID RUSSELL PASKAS HUDSON, 130-, born January 30, 1942, as son of the decedent.

IT IS FURTHER ORDERED that as hereinabove modified, the said Order Determining Heirs of December 30, 1949, is affirmed and the Superintendent of the Western Washington Indian Agency is directed to proceed with distribution of the estate property as therein fully provided and all distributions heretofore made prior to the date of this Order of monies and other personal properties are not to be disturbed and are final.

Dated this 9th day of April, 1975, at Portland, Oregon.

/s/ Robert C. Snashall
ROBERT C. SNASHALL
Administrative Law Judge

THIS ORDER WAS MADE AND SIGNED BY OTHER THAN THE ADMINISTRATIVE LAW JUDGE WHO PRESIDED AT THE RECEPTION OF THE EVIDENCE PURSUANT TO THE PROVISIONS OF 5 USC § 554.

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